Supreme Court, U.S.
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No. 92-1038

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

Waterman Steamship Corporation, *in personam*, and the Vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE, *in rem*,

*Petitioners*,

—against—

RAPHAELY INTERNATIONAL, INC., *et al.*,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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January 8, 1993

## STATEMENT PURSUANT TO RULE 29.1

Plaintiff Raphaely International, Inc. was a wholly owned subsidiary of Leo Raphaely & Sons. Both Raphaely International, Inc. and Leo Raphaely & Sons have been wound up and no longer conduct business activities.

Plaintiffs Allianz Via Iardt; Allianz; Boreas S.A.; L'Europe; Lanquedoc; and Rhin & Mosselle are members of the Allianz Via Group which is publicly owned and is listed and traded on the Paris Stock Exchange. The Allianz Via Group is owned by Allianz A.G. which is publicly owned and is listed and traded on the Frankfurt Stock Exchange.

Plaintiff Alpina is a member of the Zurich Group which is publicly owned and is listed and traded on the Zurich Stock Exchange.

Plaintiff New Hampshire Insurance Co. is a subsidiary of the American International Group (AIG) which is publicly owned and is listed and traded on the New York Stock Exchange.

Plaintiff Skandia is an affiliate of the Skandia Group which is publicly owned and is listed and traded on the Stockholm Stock Exchange.

In respect to plaintiffs Navigation & Transport; G.F.A.; Chasyr; Nieuw Rotterdam; Q.B.E.; Parisienne De Garantie; Black Sea and Baltic; L'Alsacienne; Ancienne Mutuelle; Ass. Generales Phenix; Astree; C.A.M.A.T.; Le Continent; Lloyd Continental; Nantaise; Assurances Nationales; Reunion Europeenne; Reunione Adriatica; Assurances Generales; Nouvelle D'Assurance; and Independance, there are no parent or subsidiary companies which are required to be listed pursuant to Rule 29.1.

## COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court issue a *writ of certiorari* to review a determination of the Court of Appeals affirming a District Court decision holding that the development of aflatoxin in Respondents' cargo of peanuts was not caused by an existing defect or inherent vice of peanuts but rather was caused by Petitioners' negligent failure to provide seaworthy vessels and Petitioners' negligent failure to provide proper stowage and care of Respondents' cargo?

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## COUNTERSTATEMENT OF THE CASE AND PROCEEDINGS BELOW

Pursuant to an ocean contract of carriage entered into with Respondents, Petitioners provided fifteen LASH barges which were carried aboard three LASH vessels, STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE, to transport approximately 4500 metric tons of Sudanese peanuts from Port Sudan to Newport News, Virginia. The peanuts, earlier purchased by Respondents, were certified "aflatoxin nil" by the Sudanese National Analytical & Quality Control Laboratories following inspection and testing in Port Sudan. The District Court accepted certificates of inspection as proof of delivery to Petitioners in good order and condition of the peanuts upon loading. Upon arrival, the U.S. Department of Agriculture rejected ten of the fifteen bargeloads of peanuts for excessive aflatoxin thus establishing Respondents' *prima facie* case. The levels of aflatoxin found on outturn ranged in levels from 78 ppb (parts per billion) to 322 ppb.[1].

After fourteen days of trial, consisting of the live testimony of thirteen witnesses, including seven experts, the deposition testimony of twenty-four other witnesses, and hundreds of exhibits, the Court concluded that, because the LASH barges were improperly loaded, precluding proper ventilation, and were improperly equipped, lacking sweat battens and adequate bilges, the

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[1] In addition to aflatoxin contamination, the USDA also rejected five bargeloads of peanuts because of Khapra beetle infestation, found in one barge, for which Petitioners also were held liable. These peanuts were refused entry by the USDA and were retransported to Rotterdam where they were tested and also found to contain impermissibly high levels of aflatoxin, *i.e.*, 38 ppb. to 570 ppb.

aflatoxin contamination developed after the peanuts were loaded aboard and sealed inside the Petitioners' LASH barges. Furthermore, after loading, the barges were moored in fleeting areas offshore for days. There they were exposed to the sun. This produced temperature gradients[2] which permitted moisture migration to take place within the peanut cargoes.[3] Moisture migration was a factor in the production of the aflatoxin. Some barges also leaked, thus adding to the moisture levels. Although Petitioners represented that they knew of the special requirements for the proper carriage of peanuts and that their vessels were equipped to provide the cargo space and ventilation which was required, they, nevertheless, failed to provide the care mandated by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (1936).

Not only were the LASH barges inadequate for the carriage of the peanut cargoes, but the District Court also found that conditions aboard the mother vessels STONEWALL JACKSON, BENJAMIN HARRISON and ROBERT E. LEE further permitted the production of aflatoxin. Each mother vessel's ventilation system, which was connected to most, though not all, of the barges, was unable to be used during periods of high humidity, fog, mist, rain, sea spray, or dust storms. Due to these conditions, each of these vessels had to shut down its ventilation system several times during the voyage. The District Court also found that the vessels were not equipped with permanent or temporary dehu-

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[2] A temperature gradient is the difference in temperature between two points in a mass.

[3] The barges were also left in fleeting areas in Newport News from five to eighteen days following discharge from the mother vessels.

midification systems which could be used in any weather condition and which would have eliminated moisture accumulation in the barges.

Aflatoxin is a potent carcinogen, but it is *not* "naturally and unavoidably present in some foods" as stated in the Petition of Waterman (p. 3). This quote, taken from *Young v. Community Nutrition Institute*, 476 U.S. 974, 978 (1986), was not a finding made by the lower Court, but was a proposition agreed to by counsel. The issue in that case did not involve the origin or development of aflatoxin as does the case at bar; rather, it involved the interpretation of Title 21 U.S.C. § 346. Counsels' agreed proposition in that case is not controlling herein. To the contrary, the record in the instant case establishes that the development of aflatoxin can be prevented by controlling the environmental factors which cause molds to develop from spores, *i.e.*, controlling the temperature, humidity, aeration and the moisture content of the substrate.[4] It was Petitioners' failure to control these factors during the voyages in question that caused the production of aflatoxin. That negligence was causative; liability was properly imposed by the District Court.

A unanimous Court of Appeals affirmed the judgment of the District Court. A unanimous Court of Appeals also denied the petition for rehearing.

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[4] A substrate is any commodity which will support aflatoxin production, *e.g.*, peanuts, corn, rice, wheat, barley, soybeans, etc.

## REASONS FOR DENYING THE WRIT

The Petitioners' argument should be rejected for the following reasons:

Petitioners, having failed in the District Court and Court of Appeals, now attempt to persuade this Court to issue a *writ of certiorari* to address a supposed conflict between two Circuits where no conflict actually exists.

Petitioners have submitted a very narrow issue, arguing that the standard applied by the Second Circuit to the definition of inherent vice approved by this Court in *Missouri Pac. R.R. v. Elmore & Stahl*, 377 U.S. 134 (1964), includes only the phrase following the disjunctive "or", *i.e.*, "the inherent nature of the commodity which would cause it to deteriorate with a lapse of time", (Petition of Waterman, p. 5) and that the standard applied by the Seventh Circuit in *Mulay Plastics, Inc. v. Grand Trunk Western R.R. Co.*, 822 F.2d 676 (7th Cir. 1987), to the definition of inherent vice includes the phrase preceding the disjunctive "or", *i.e.*, "any existing defects, diseases, decay." (Petition of Waterman, p. 6)

Respondents respectfully reiterate, there is no conflict between the Circuits. The standard applied by the Second Circuit includes the full definition of inherent vice, *i.e.*, the phrase before and after the disjunctive "or", as is evident by the following language appearing in *Vana Trading Co. v. S.S. METTE SKOU*, 556 F.2d 100, 104 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977).

> The Supreme Court has accepted a jury charge defining the latter term as " 'any existing *defects, diseases, decay or the inherent nature* of the commodity which will cause it to deteriorate with a lapse of time.' " *Missouri Pacific R.R. v. Elmore &*

> *Stahl*, 377 U.S. 134, 136, 138-39, 84 S.Ct. 1142, 1143, 12 L.Ed.2d 194 (1964). By using the term "susceptible" in this context Judge Pollack would seem to have meant only that the yams were particularly able to be affected by the conditions under which they were packed, stowed and unloaded and not that their condition was such that they would have deteriorated merely through "a lapse of time." *Moreover*, Judge Pollack found that "the damage suffered by the cargo was caused by the conditions to which it was subjected in transit, *and not by any inherent defects*,". . . .

(emphasis added) (footnote omitted)

Similarly, the District Court's decision in the case at bar also included the full definiton of inherent vice, when it held:

> On the evidence before me I conclude that the development of aflatoxin here was not caused by any *existing defect* or inherent vice of the peanuts.[5]

(Petition of Waterman, p. 23a) (emphasis added)

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[5] Petitioners' argument that "aflatoxin" is an inherent vice is completely misplaced. Aflatoxin represents damage to cargo, *i.e.*, not a cause, an effect, *Schnell v. The VALLESCURA*, 293 U.S. 296, 305 (1934). An inherent vice is listed as an exception to COGSA under the subheading entitled "Uncontrollable causes of loss." (Petition of Waterman, p. 37a) The record in the trial below established that the development of aflatoxin is controllable. By controlling the environmental factors influencing sporilation, mold growth and toxin development, *i.e.*, the moisture content of the peanuts, the ambient temperature, the relative humidity and the degree of aeration, the development of aflatoxin can be prevented. Petitioners' negligence and unseaworthy vessels failed to control the environmental factors, all of which led to the development of excessive levels of aflatoxin for which they were properly held liable.

*Vana Trading Co. v. S.S. METTE SKOU*, *supra*, was cited by the District Court in support of its findings on inherent vice.

The District Court held Petitioners liable for violations of COGSA §§ 1303(1) and (2). The Court of Appeals for the Second Circuit held that the record on appeal contained ample evidence to support the District Court's findings of fact. The Court of Appeals held that "the district court reasonably concluded that the damage occurred while they were in Waterman's care." (Petition of Waterman, p. 11a)

Petitioners have studiously avoided advising this Court, in their Petition, that they were held liable because their vessels were unseaworthy, *i.e.*, not reasonably fit to carry the cargo which they had undertaken to transport, and that they were negligent in the stowage, care and custody of the cargo.

The Respondents made out their *prima facie* case by proving good order and condition of the peanuts upon loading, and arrival in damaged condition. Respondents, having carried their burden of establishing good order and condition of the cargo when shipped, *Vana Trading Co. v. S.S. METTE SKOU*, 415 F. Supp. 884 (S.D.N.Y. 1976), *rev'd on other grounds*, 556 F.2d 100 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977), the burden shifted to the Petitioners, ocean carriers, to establish their non-culpability by proving that either the harm resulted from an excepted cause under § 1304(2), *e.g.*, inherent vice, or the damage was not due to their negligence, *i.e.*, that pursuant to §§ 1301(1) and (2) of COGSA, they exercised due diligence to make the ships seaworthy and properly handled, stowed and cared for the cargo. *American Tobacco Co. v. The KATINGO HADJIPATERA*, 81 F.

Supp. 438 (S.D.N.Y. 1948), *modified & aff'd as modified*, 194 F.2d 449 (2d Cir. 1951), *cert. denied*, 343 U.S. 978 (1952); *Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d 426 (2d Cir. 1962); *Quaker Oats Co. v. M/V TORVANGER*, 734 F.2d 238 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

Petitioners never proved the excepted cause under § 1304(2). Not one witness or one document was offered to prove the defense of inherent vice.

In *Schnell v. The VALLESCURA*, 293 U.S. 296, 305 (1934), a Harter Act case involving damage to a cargo of Spanish onions, during an ocean voyage, this Court held:

> It is sufficient, if the carrier fails to show that the damage is from an excepted cause, *to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage*.

(emphasis added)

Petitioners did not carry the further burden set forth in *Schnell v. The VALLESCURA*, *supra*. On the contrary, the proof at trial established that the contamination of the peanut cargoes with aflatoxin, to the degree that they were ultimately rejected, began after they were loaded aboard and sealed inside the Petitioners' barges, where the unseaworthiness of all Petitioners' vessels and the failure to properly load and care for these cargoes caused the aflatoxin to develop to the excessive levels found upon outturn by the U.S. Department of Agriculture. The Court of Appeals held that those findings, based on ample evidence, were not clearly erroneous. Thus, because of their negligence, established at trial, Petitioners cannot prevail on the merits in this case.

Petitioners' second argument was mentioned by their counsel only as a final remark to the District Court during summation. No proof, however, was offered by Petitioners at trial. Nor was the argument raised in the Court of Appeals. It, therefore, has no standing to be heard in this Court. *Miree v. DeKalb County*, 433 U.S. 25 (1977); *Lawn v. United States*, 355 U.S. 339 (1958). In addition, the argument lacks the requisite jurisdictional or fundamental character to qualify as an exceptional case, which may be heard, regarding questions not pressed or passed upon below. *Duignan v. United States*, 274 U.S. 195, 200 (1927).

The argument, in any event, is wholly without merit because it is based on the false premise that aflatoxin is an inherent vice. Petitioners argue, disingenuously, that since inherent vice is an excluded risk under the standard marine cargo insurance policy, Respondents had to procure insurance to cover aflatoxin rejection, thereby equating aflatoxin with the excluded risk of inherent vice. This is a *non sequitur*. Petitioners omit advising this Court that the insurance covered rejection for any reason whatsoever, *e.g.*, it covered rejection for Khapra beetle infestation, which is not an excluded risk, for which Petitioners were also held liable. The rejection that took place resulted not from an inherent vice of the cargo but from aflatoxin damage caused by the negligence of the Petitioners in failing to provide the care mandated by COGSA.

The risks envisioned by shipping interests before enactment of COGSA remain unchanged. H.R. Report 2218, cited by Petitioners (p. 7), contains a "Brief History of the Hague Rules," wherein the United States delegates, in recommending adoption of the Rule, said:

> We regard the rules as finally formulated at Brussels a beneficial advance upon anything heretofore known in respect of bills of lading. *The responsibility of carriers are materially increased; they will be obliged to cover additional risks by additional insurance.* . . .
>
> But such increase in carrier's responsibilities represents the united and insistent desire of shippers and cargo owners as well as of underwriters, *notwithstanding the fact that the same underwriters will continue to insure the same risks whether the same are assumed by carriers or cargo.*

H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1, at 4-5 (1936) (emphasis added)

The decision in this case has created no new allocation of risk. It correctly and properly held Petitioners at fault for violations of COGSA which are risks that have always been covered by marine underwriters.

## CONCLUSION

The petition for a *writ of certiorari* should be denied.

Respectfully submitted,

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